

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT NEW YORK**

Tracy Albert, Dimitrios Malaxianis, and Tatyana Oshkina, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

BLUE DIAMOND GROWERS,

Defendant.

Case No. 15-cv-4087

**SECOND AMENDED CLASS ACTION  
COMPLAINT**

**JURY TRIAL DEMANDED**

**CLASS ACTION COMPLAINT**

Plaintiffs Tracy Albert, Dimitrios Malaxianis, and Tatyana Oshkina (“Plaintiffs”), by and through their undersigned counsel, upon personal knowledge as to themselves and upon information and belief as to all other matters, allege as follows:

**SUMMARY**

1. Plaintiffs bring this consumer class action against Blue Diamond Growers (“Blue Diamond” or “Defendant”) on behalf of themselves and all other persons in the United States who, from January 1, 2009, up to and including the present (the “Class Period”), purchased for consumption and not resale any of Blue Diamond’s Almond Breeze almond milk labeled products.

2. During the Class Period, Blue Diamond engaged in a uniform campaign through which it purposefully misrepresented and continues to purposefully misrepresent to consumers that its almond milk labeled products are heart healthy and contain a significant amount of

almonds, when in fact, said products contain only 2% of almonds and the products are not heart healthy.

3. Blue Diamond's actions constitute deceptive acts and practices in violation of consumer protection laws in New York and California, and unjust enrichment.

4. As a result of these unfair and deceptive practices, Defendant has collected hundreds of millions of dollars from the sale of their almond milk labeled products that it would not have otherwise earned but for their deceptive acts and practices.

### **PARTIES, JURISDICTION, AND VENUE**

5. Plaintiff Tracy Albert is a citizen of the State of California. From approximately January 2012 through May 2015, Ms. Albert purchased various Blue Diamond Almond Breeze almond milk labeled products for personal consumption. Said almond milk products were purchased at various grocery stores located within the State of California, but primarily at Vons.

6. Plaintiff Dimitrios Malaxianis is a citizen of the State of New York. From at least June 2014 through May 2015, Mr. Malaxianis purchased various Blue Diamond Almond Breeze almond milk labeled products for personal consumption. Said almond milk products were purchased at various grocery stores located within the State of New York, but primarily at Key Food.

7. Plaintiff Tatyana Oshkina is a citizen of the State of New York. From approximately November 2013 through June 2015, Ms. Oshkina purchased various Blue Diamond Almond Breeze almond milk labeled products for personal consumption. Said almond milk products were purchased at various grocery stores located within the State of New York, but primarily at Foodtown.

8. Blue Diamond Growers is a California corporation with its principal place of business located in Sacramento, California. Blue Diamond is an agricultural cooperative and marketing organization that specializes in almonds. Founded in 1910 as the California Almond Grower's Exchange, Blue Diamond claims to be the world's largest tree nut processing and marketing company. It serves 3,500 almond growers, and helps make the almond crop (valued at over \$1 billion) California's largest food export.

9. Blue Diamond sells roasted almonds under the Blue Diamond brand and almond milk labeled products under the Almond Breeze brand.

10. Blue Diamond is the largest manufacturer of almond milk labeled products in the United States. Blue Diamond sells its almond milk labeled products to consumers through grocery and other retail stores throughout New York and the United States.

11. Blue Diamond manufactured, advertised, marketed, and sold almond milk labeled products to tens of thousands of consumers nationwide, including New York.

12. The Court has jurisdiction over Blue Diamond because its almond milk labeled products are advertised, marketed, distributed, and sold throughout New York; Blue Diamond engaged in the wrongdoing alleged in this Complaint throughout the United States, including in New York; Blue Diamond is authorized to do business in New York; and Blue Diamond has sufficient minimum contacts with New York and/or otherwise has intentionally availed itself of the markets in New York, rendering the exercise of jurisdiction by the Court permissible under traditional notions of fair play and substantial justice. Moreover, Blue Diamond is engaged in substantial and not isolated activity within this state.

13. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332, because this is a class action, as defined by 28 U.S.C. § 1332(d)(1)(B), in which a member of the putative

class is a citizen of a different state than Blue Diamond, and the amount in controversy exceeds the sum or value of \$5,000,000, excluding interest and costs. See 28 U.S.C. § 1332(d)(2).

14. Venue is proper in this district because a substantial part of the events giving rise to Plaintiffs' claims occurred in this district, and Blue Diamond is subject to personal jurisdiction in this district.

### **FACTUAL ALLEGATIONS**

15. More and more consumers worldwide are becoming more health conscious and are willing to pay premium prices for healthier foods.

16. Various studies have shown that eating 1.5 ounces of most nuts a day, including almonds, may reduce the risk of heart disease.

17. Citing said studies, the International Tree Nut Council, petitioned the Food and Drug Association (the "FDA"), for approval of a proposed heart health claim for peanuts, almonds, Brazil nuts, cashew nuts, hazelnuts, macadamia nuts, pecans, pine nuts, pistachio nuts, and walnuts.

18. In a letter dated July 14, 2003, the FDA rejected the proposed health claims by the International Tree Nut Council but stated that the following health claim can be made:

"Scientific evidence suggests but does not prove that eating 1.5 ounces per day of most nuts [, such as name of specific nut,] as part of a diet low in saturated fat and cholesterol may reduce the risk of heart disease. [See nutrition information for fat content.]"

<http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm072926.htm>

19. The nut industry now regularly uses this statement in selling their nuts, including Blue Diamond in the sale of its almonds.

20. Around 2009, Blue Diamond began to mass market a product it described as almond milk across the United States. The brand name it gave to the product was Almond Breeze.

21. Almond milk is a drink made from ground almonds, frequently used as a substitute for dairy milk, and has been known to be prepared and consumed as far back as the 5th century. See [http://en.wikipedia.org/wiki/Almond\\_milk](http://en.wikipedia.org/wiki/Almond_milk); see also <http://silk.com/products/learn-more/about-almondmilk>.

22. The basic method of modern domestic almond milk production is to grind soaked almonds in a blender with water, then strain out the almond pulp (flesh) with a strainer, cheesecloth, or nut milk bag. *Id.* You can add a sweetener such as honey or keep it unsweetened.

23. The actual amount of almond content contained in the final product will depend on how many almonds are used, how much water is used, and how fine the almonds are ground.

24. The most efficient and cost effective way of making almond milk is to finely grind almonds until they turn into what is commonly referred to as almond butter. From there, you blend the almond butter with water to create almond milk. There is no straining of almonds in this method and no wasted pulp.

25. On its packaging, Blue Diamond describes its almond milk products as being “ALMONDMILK, and that it is “Made from REAL almonds.”



26. As can be seen above, Blue Diamond states on the packaging that the product is certified by the American Heart Association (the “AHA”) as a “heart healthy food.”

27. Blue Diamond also displays a picture of two hands with approximately one cup, or 92 almonds, overflowing from the hands on the Almond Breeze packaging.





28. Blue Diamond states the following on its website in regard to the creaminess of Almond Breeze:

How do you make the Almond Breeze® so creamy without adding dairy ingredients?

Almonds naturally contain a high content of good fat that provides for a naturally creamy texture. Blue Diamond has developed product formulas that deliver a mild tasting almondmilk with a smooth and creamy texture. Almond Breeze is made with carefully selected almonds and quality ingredients which when combined and processed in the proper ratios results in truly unique product.

<https://www.almondbreeze.com/?navid=342>

29. Blue Diamond also states on its website that its almond milk labeled products are “**made from** real California almonds.”



### Original

Made from real California almonds, Almond Breeze Original is a deliciously creamy alternative to dairy and soymilk. Almond Breeze Original is lactose free, soy free, calcium enriched, and contains only 60 calories per glass—that's half the calories of 2% milk.\*

Also available in an 96oz jug.

\* 1 cup/ 8 fl. oz. USDA reduced fat milk, 2% milkfat, with added vitamin A vs. 1 cup/8 fl. oz. Almond Breeze Original Flavor.

► Nutritionals and Ingredients

► Where to Buy

► Share

See <http://www.almondbreeze.com> (emphasis added).



30. Finally, Blue Diamond makes the following health claims on its website:

## The Amazing Almond

There may be no such thing as a perfect food, but almonds come in high on the super-food list. A top plant source for protein and vitamin E, each little almond also comes packed with fiber, calcium, iron, and other important nutrients. Your body needs fat to function and the monounsaturated fat found in almonds is the very best kind for your health. In fact, research studies suggest that almonds may help lower blood cholesterol, an important step in maintaining heart health. So adding almonds to your diet every day just might help keep the doctor away.

We created Almond Breeze® for people with lactose intolerance and have discovered that it's also a great milk alternative for people with other conditions, including diabetes, heart disease, celiac disease and obesity. People without any health conditions drink it, too, because they love the taste and the nutritional benefits almonds provide.

The reasons many add Almond Breeze to their daily diets lie in what you will and won't find in a carton of Almond Breeze.

## What You Won't Find in Almond Breeze

Many people have conditions that require them to avoid certain foods or ingredients, so it's important to know what Almond Breeze does not contain:

- Lactose
- Saturated Fat
- Cholesterol
- Gluten
- Dairy
- Casein

## Why Those Things Matter

Research is showing that adding almonds to your daily diet can help people with certain conditions enjoy healthier lives. Almonds and Almond Breeze also provide welcome alternatives to people who need to stay away from foods and food ingredients because of certain health conditions.

**Lactose Intolerance** – Whether mild or severe, the symptoms of lactose intolerance are no fun. We developed Almond Breeze to provide our lactose-intolerant customers with a creamy, tasty, calcium-enriched alternative to dairy milk and were delighted to discover others started drinking it because they love the taste!

**Type 2 Diabetes** – Almonds and unsweetened Almond Breeze fall low on the glycemic index, a scale used to measure the amount that carbohydrate-containing foods raise blood glucose levels within two hours. With less than three carbohydrate grams per serving, Almond Breeze Unsweetened shaves off nine to 10 grams per serving when used in place of nonfat milk.

In addition to eating almonds and drinking Almond Breeze, adding almonds to foods that are higher on the glycemic index can lessen the rise in blood glucose levels that food causes.

**Heart Disease** – In 2003, the FDA approved a qualified health claim that states "Scientific evidence suggests but does not prove that eating 1.5 ounces per day of most nuts, such as almonds, as part of a diet low in saturated fat and cholesterol may reduce the risk of heart disease." A great deal of research has been done that shows almonds can help maintain and possibly lower cholesterol levels, an important factor in reducing heart-disease risk.

**Weight Maintenance** – Unsweetened Almond Breeze is a natural choice for the weight conscious. The combination of protein, fiber and monounsaturated fat found in almonds also has been shown to help people feel full, which tends to lower food consumption throughout the day.

**Celiac Disease** – Though many people with celiac disease can tolerate dairy milk, others may develop lactose intolerance over time. Either way, it's important to know that Almond Breeze contains no gluten, lactose or casein (a protein found in milk).

Learn more about the health and nutrition benefits almonds provide in the [Your Health](#) section at [www.BlueDiamond.com](http://www.BlueDiamond.com).

See <http://almondbreeze.com/?navid=347>.

31. Almond Breeze has become a very popular beverage among consumers as a result of its purported almond content and heart healthy benefits and quickly became the largest manufacturer of almond milk labeled products in the United States.

32. As a result of Almond Breeze's success, in 2010, WhiteWave Foods, a company known for its soy milk labeled products launched an almond milk labeled product that it named Silk PureAlmond. See "Move Over, Cow, Almond Milk Sparks Fight in Dairy Case; the Cookie Dunk-Off," Anne Marie Chaker, January 12, 2011, The Wall Street Journal.

33. WhiteWave further described its almond milk labeled product as "100% mouth-watering almond deliciousness."



34. Upon information and belief, at some time during the past year or two, WhiteWave dropped the PureAlmond name.

35. WhiteWave's current packaging describes the product as "almondmilk", displays a numerous amount of almonds, and states that, by drinking the almond milk, consumers will "Discover the tempting taste of almonds."

36. WhiteWave further displays two heart symbols on the current packaging of its almond milk labeled products, one of which states "put a little heart in your day," inferring that the product is good for your heart.





37. WhiteWave also makes the following health claims on its website related to its Silk almond milk labeled product, inferring that its Silk almond milk labeled product is “rich” with nuts and so “may reduce mortality from heart disease and lower the incidence of high cholesterol and diabetes.”



### Why eat (& drink) more plants

Move over, meat. Or at least scoot over a little and make some room—our veggie friends are eyeing center plate. That's because more and more people are recognizing the benefits of meals based on fruits, vegetables, nuts and grains. Plus, consuming more plants can be easier on the earth, too.



#### Eat to your health


Nothing says you have to go vegan, or even vegetarian. Burger lovers and bean lovers—we love 'em all! But the benefits of a plant-based diet are well documented. And the good news is that improving your diet can be as easy as slipping in an extra serving or two of fruit, veggies, nuts or soy every day.

A plant-based diet rich in fruits, vegetables, nuts, whole grains and meat substitutes (like soy) may reduce mortality from heart disease<sup>1</sup> and lower the incidence of high cholesterol<sup>2,3</sup> and diabetes.<sup>4</sup>

Silk® can be a great place to begin. Try delicious soymilk, almondmilk or coconutmilk instead of your usual dairy milk in cereal, or pack a tempting Fruity & Creamy dairy-free yogurt alternative for lunch. It could be the start of a deliciously smart new habit.

<http://silk.com/healthy-living/plant-based-diet>.

38. Concerning the taste and creamy richness of Silk's almond milk labeled product, WhiteWave states that following on its website:



A carton of Silk Original Almondmilk is shown next to a pile of almonds. The carton is blue and white with the Silk logo and 'Almondmilk' text. A label on the carton says '60 CALORIES per serving'.

## It all begins with the *tasty little almond*

We'd like to say we're responsible for the amazing taste of **Silk® Almondmilk**. But most of the credit goes to, well, the almonds. One sip and you'll see what we mean.

### A mouthwateringly simple story


Our delicious almondmilk starts with **Non-GMO verified almonds** grown in California. Only nuts that match our stringent standards for size, density and color make the cut. The winners are shelled, toasted and ground before being blended with pure filtered water, along with other ingredients like vitamins, minerals and a touch of natural flavor. Simple, isn't it? And simply impossible to resist.

### Go nuts, without the guilt

With a mildly nutty taste and a calorie count that isn't nutty at all, our almondmilk is perfectly poised to become your cereal's new best friend. Plus it's a smart swap for milk in **recipes** or shakes. Every delicious glass packs 50% more calcium than dairy milk,<sup>1</sup> with absolutely no cholesterol and no saturated fat. That's what we call the power of **plant-based nutrition!**

### Why didn't we think of almondmilk ages ago?

The truth is that taste pioneers recognized the versatility and goodness of almondmilk as early as the fifth century, when almondmilk was consumed all the way from ancient Spain to Eastern Asia. So you might think of Silk® as the newest branch of the almondmilk family tree.



Five almond-shaped graphics arranged in a cluster, each with a different brown color and a subtle pattern of lines or dots.

See <http://silk.com/products/learn-more/about-almondmilk>.

39. Like Almond Breeze, Silk has become a very popular beverage among consumers as a result of its purported almond content and heart healthy benefits and quickly became the second largest manufacturer of almond milk labeled products in the United States.

40. In 2011 alone, almond milk sales increased by 79%....In 2013, it surpassed soy milk as the most popular plant-based milk in the U.S.” *See* [http://en.wikipedia.org/wiki/Almond\\_milk](http://en.wikipedia.org/wiki/Almond_milk).

41. The almond milk industry is currently generating over \$700 million in sales of almond milk with Blue Diamond and WhiteWave generating the vast majority of the sales. *See* “America’s Almond Milk Boom Tops \$700 Million in Sales”, Venassa Wong, August 8, 2014, Bloomberg.com, at <http://www.bloomberg.com/bw/articles/2014-08-08/the-almond-milk-boom-silks-huge-sales-lead-the-way-trounce-soy>.

42. Almond milk sales are continuing to show strong growth as Blue Diamond and WhiteWave continue to implement mass marketing and advertising campaigns geared towards converting dairy milk consumers to allegedly healthier and similarly tasting Almond Breeze and Silk milk-alternatives.

43. On November 19, 2014, Blue Diamond announced in a press release that “Blue Diamond Growers’ global almond sales soared to \$1.5 billion, up \$300 million in fiscal year 2013-14, paying record dividends of \$1 billion to the cooperative’s grower-owners, according to President and CEO Mark Jansen who addressed almond growers at their 104th annual meeting.” *See* <http://www.prnewswire.com/news-releases/record-sales-of-15-billion-yields-record-grower-return-283236401.html>. Blue Diamond went on to state “Jansen projected that within five years, the cooperative’s sales of almond milk will surpass U.S. skim milk sales....”

44. WhiteWave stated in its annual report to shareholders that “Net sales increased \$92.4 million, or 22.1%, for the year ended December 31, 2014 compared to 2013. The increase was driven principally by continued strong volume growth, especially in plant-based beverages, led by almond beverages....”

45. WhiteWave further stated to its shareholders in its annual report that “We believe that the plant-based foods and beverages category will continue to experience favorable growth supported by a rising consumer focus on nutritional benefits, such as digestive and heart health, as well as by the positioning of these products as low-fat, low-calorie, and cholesterol-free dairy alternatives. Plant-based foods and beverages also enjoy advantaged environmental impact profiles over dairy milk, particularly in greenhouse gas production and water use.”

### **The Truth is Revealed**

46. Unbeknownst to consumers, Blue Diamond and WhiteWave are selling products that are branded as almond milk, and leading people to believe that the products contain a significant amount of almonds when the products contain only 2% of almonds.

47. Instead the products are made from low cost thickening ingredients and high amounts of sugar with no nutritional value. Said thickening agents are used to create the products’ creamy milk like substance which consumers believe is being derived from almonds, and said high amounts of sugar are being used to attract consumers to the taste of Almond Breeze and Silk.

48. Accordingly, Almond Breeze and Silk are imitation almond milk products.

49. The discovery that Blue Diamond and WhiteWave’s “almond milk” branded products actually contain just 2% of almonds first came to light on April 20, 2015, when Ryan



Gormon, a reporter from BusinessInsider.com, released the following article titled "Here's what happened when I started asking the almond industry about the ingredients in almond milk":

*A simple question sent me on a bizarre journey.*

*I knew that a standard serving of almond milk contains a fraction of the nutritional value found in a serving of almonds.*

*So I wanted to find out just how many almonds are actually in a carton of almond milk.*

*Two major almond companies, Blue Diamond and Califia, declined to reveal the exact amount of almonds in their milk (despite repeated assurance that I was not writing about the California drought).*

*A series of phone calls and emails between Blue Diamond and a PR firm representing Califia ended when Blue Diamond referred me to a trade group called the Almond Board of California and Califia declined to answer my question due to the proprietary nature of their almond milk formula.*

*I then spoke with Almond Board of California spokeswoman Carissa Sauer, who couldn't (or wouldn't) tell me how many almonds are used to make commercial almond milk.*

*"I will talk to the group," she said, assuring she would call me back.*

*She never called back.*

*About 20 minutes later, I got an email from the Almond Board about a late-afternoon press conference scheduled "to add sorely-needed facts and context to the recent discussion around California's drought."*

*Richard Waycott, who heads up the Almond Board, spoke at length about various things related to the drought and how almonds have or have not affected the state's water supply. But he did not mention almond milk.*

*I asked point-blank: "How many almonds are in the average half-gallon container of almond milk?"*

*Waycott gave a rambling answer about different producers and varying formulas before referring me back to the almond companies.*

*I pressed him: "But [Blue Diamond] referred me to you ... [because] the formulas are fairly standardized across the board."*

*Waycott said, "That's interesting, because we really don't have that knowledge."*

*No one knew exactly what is in a carton of almond milk.*

*Sauer emailed me back hours later to suggest I check product labels in the UK. She said nutrition labels there tend to be more detailed and "the ingredient combinations are pretty similar."*

*One brand of British almond milk, I finally found out, contains just 2% almonds per carton. The remainder is water, vitamins, and thickening agents.*

50. Upon further investigation, Plaintiffs' counsel discovered that Blue Diamond discloses on the packaging of Almond Breeze almond milk labeled products sold in the United Kingdom that there are only 2% of almonds in the beverage, and also discloses the same on a website for United Kingdom purchasers and consumers of Almond Breeze branded products. <http://www.bluediamondalmonds.co.uk/almond-breeze/dairy-free-milk/alternative/unsweetened>.

51. WhiteWave's Silk almond milk product is sold in the United Kingdom under the name Alpro, and it also discloses that its Alpro branded almond milk labeled product contains just 2% almonds. <http://www.alpro.com/uk/products/drinks/almond/original-fresh#productrange>

52. Plaintiffs further discovered that Blue Diamond does not refer to Almond Breeze as being almond milk on its packaging in the United Kingdom, but refers to it as a "dairy free milk alternative."

53. Similarly, WhiteWave does not refer to Alpro as almond milk but refers to it as an "almond drink" on its United Kingdom website.

54. Other companies in the United States, such as Trader Joes and Pacific Foods, which upon information and belief, sell products similar in recipe to Almond Breeze and Silk in that they only contain only 2% of almonds, and are primarily made from low cost thickening agents and sugar, recognize it is misleading to refer to such products as almond milk and instead

refer to their products as an “almond beverage.” Trader Joes and Pacific Foods do not make heart health claims or display misleading amounts of almonds on their packaging.

55. Further, United Kingdom is similar to the United States in that regulations require that ingredients must be listed by weight, with the highest percentage ingredient coming first.

56. Almond Breeze’s United Kingdom packaging lists the second highest ingredient after water as raw cane sugar in its Almond Breeze.

57. Likewise, Silk’s United Kingdom packaging lists the second highest ingredient as sugar, after water.

58. Accordingly, there is more sugar in Almond Breeze and Silk than there are almonds.

59. In the United States, Blue Diamond and WhiteWave further deceive consumers by listing almonds as the second highest ingredient, leading consumers to believe that there is a significant amount of almonds contained in the products, and less sugar.

60. Blue Diamond and WhiteWave actually admit that their Almond Breeze and Silk almond milk labeled products are not almond milks by stating on their ingredients label that the first ingredient is “almondmilk,” which is defined by Blue Diamond and WhiteWave as filtered water and almonds.

61. Blue Diamond states the following on its current ingredient label with respect to its original Almond Breeze sold in the United States:

**INGREDIENTS:**ALMONDMILK (FILTERED WATER, ALMONDS), EVAPORATED CANE JUICE, CALCIUM CARBONATE, SEA SALT, POTASSIUM CITRATE, CARRAGEENAN, SUNFLOWER LECITHIN, VITAMIN A PALMITATE, VITAMIN D2, D-ALPHA-TOCOPHEROL (NATURAL VITAMIN E).

62. WhiteWave states the following on its current ingredient label with respect to its original Silk sold in the United States:

INGREDIENTS: Almondmilk (Filtered Water, Almonds), Cane Sugar, Sea Salt, Locust Bean Gum, Sunflower Lecithin, Gellan Gum.

VITAMINS & MINERALS: Calcium Carbonate, Vitamin E Acetate, Vitamin A Palmitate, Vitamin D2.

63. With regards to Blue Diamond's claim that it's Almond Breeze is certified by the AHA, Plaintiffs have discovered that the AHA does not list Almond Breeze or almond milk as a heart healthy food, and this claim is false.

See [http://www.heart.org/HEARTORG/GettingHealthy/NutritionCenter/Heart-CheckMarkCertification/Certified-Foods-in-the-Grocery-Store\\_UCM\\_474831\\_Article.jsp](http://www.heart.org/HEARTORG/GettingHealthy/NutritionCenter/Heart-CheckMarkCertification/Certified-Foods-in-the-Grocery-Store_UCM_474831_Article.jsp).

64. Further, as the FDA has already indicated with regard to almonds, there can only be qualified heart health claims.

65. Not only does Blue Diamond and WhiteWave fail to state any qualified health claims on the packaging of its products, they make affirmative statements that the products are healthy for your heart without disclosing that there are only 2% almonds per serving.

66. Plaintiffs have discovered that 2% almonds per serving amounts to approximately 3.68 almonds per serving (based on weight, 2% amounts to .16 of an ounce in an 8 ounce serving, multiplied by approximately 23 almonds in an ounce).

67. The FDA has stated that 1.5 ounces, or approximately 34.5 almonds per day may reduce the risk of heart disease (based on an approximation of 23 almonds in an ounce).

68. Accordingly, it would require each consumer to drink 9.375 servings, or more than a half a gallon of the Almond Breeze or Silk products every day to achieve the health benefits that may be obtained as stated by the FDA.

69. Almond Breeze and Silk is not healthy as advertised, and upon information and believe, the products also contained high amounts of carrageenan to create the creamy texture which consumers believed were being created by almonds.

70. Carrageenan is an ingredient which studies have shown to have negative health effects. *See* “The Natural Ingredient You Should Ban From Your Diet” Leah Zerbe, April 30, 2013, Prevention.com- <http://www.prevention.com/food/healthy-eating-tips/carrageenan-natural-ingredient-you-should-ban-your-diet> .

71. WhiteWave has recently announced that it was removing carrageenan from its products. *See* “Controversial Ingredient To Be Removed From Silk Beverages”, August 19, 2014, Huffingtonpost.com.

72. After the filing of the amended complaint in this lawsuit against Blue Diamond, the press picked up the amended complaint and negative publicity ensued for Blue Diamond, including complaints from consumers on the Almond Breeze Facebook page as to why Almond Breeze only had 2% almonds and presumably a lot of carrageenan.

73. As a result, Blue Diamond has changed its stance and has stated that it is also removing carrageenan from its products and is using gellan gum in its place. *See* <https://almondbreeze.com/?navid=342>.

74. However, Blue Diamond is continuing to mislead consumers as to the amount of almonds contained in Almond Breeze.

75. After consumers complained on the Almond Breeze Facebook page as to the lack of almonds in Almond Breeze, Blue Diamond stated that Almond Breeze is made from on average of more than 50 almonds per half gallon.

76. However, Plaintiffs have determined that each 8-ounce serving of Almond Breeze contains 3.68 almonds, and therefore, a 64-ounce half gallon contains just 29.44 almonds, almost half of what Blue Diamond is claiming is contained therein.

**Plaintiffs And Reasonable Consumers Have Been Misled**

77. Defendant Blue Diamond is using its website and product packaging to lead distributors, grocery stores, restaurants, consumers and other buyers and resellers of almond milk in the United States to believe that their almond milk branded products are primarily made from almonds. Said information from Defendant's website and product packaging has created a false perception amongst the public that Defendant's almond milk labeled products are premium products that are healthy for you because they contain a significant amount of almonds.

78. Plaintiff Tracy Albert purchased original refrigerated and shelf stable Almond Breeze branded almond milk for consumption under the impression that the almond milk labeled product was a healthy premium product that contained a significant amount of almonds. Her decision to purchase said almond milk labeled products was because it was labeled as almond milk made from real almonds and she recalls relying upon labeling that claimed that Almond Breeze was certified by the AHA and was healthy for your heart. She also believed that the product contained more than 2 cups of almonds as a result of the numerous almonds displayed on the product packaging and the fact that it cost much more than milk. She also purchased the product based on information in the marketplace that almond milk was a healthy product. She also purchased the product because she relied on the health claims made by Blue Diamond on the Almond Breeze website, and paid a premium price for the product.

79. Plaintiff Dimitrios Malaxianis purchased original refrigerated and shelf stable Almond Breeze branded almond milk for consumption under the impression that the almond

milk labeled product was a healthy premium product that contained a significant amount of almonds. His decision to purchase said almond milk labeled products was because it was labeled as almond milk made from real almonds and he recalls relying upon labeling that claimed that Almond Breeze was certified by the AHA and was healthy for your heart. He also believed that the product contained more than two cups of almonds as a result of the numerous almonds displayed on the product packaging and the fact that it cost much more than milk. He also purchased the product based on information in the marketplace that almond milk was a healthy product. He also purchased the product because she relied on the health claims made by Blue Diamond on the Almond Breeze website, and paid a premium price for the product.

80. Plaintiff Tatyana Oshkina purchased original refrigerated and shelf stable Almond Breeze branded almond milk for consumption under the impression that the almond milk labeled product was a healthy premium product that contained a significant amount of almonds. Her decision to purchase said almond milk labeled products was because it was labeled as almond milk made from real almonds and she recalls relying upon labeling that claimed that Almond Breeze was certified by the AHA and was healthy for your heart. She also believed that the product contained more than two cups of almonds as a result of the numerous almonds displayed on the product packaging and the fact that it cost much more than milk. She also purchased the product based on information in the marketplace that almond milk was a healthy product. She also purchased the product because she relied on the health claims made by Blue Diamond on the Almond Breeze website, and paid a premium price for the product.

81. Plaintiffs have also conducted testing and have determined that to start to even come even close to the creamy like consistency of Almond Breeze and Silk, it would require at least 23 almonds per 8-ounce serving, which amounts to approximately 12.5% of almonds, or



184 almonds per half gallon. The testing was conducting by grinding the almonds into almond butter so that all of the almond material was used and exact measurements could be made.

82. Testing based on 4 almonds per 8-ounce serving produces a watery substance that tastes watery and has nowhere near the richness and creaminess of Almond Breeze or Silk.

83. Plaintiffs have discovered that there are several almond milk manufacturers that produce pure almond milk with 10-12% almond milk content, 500%-600% more almonds than Almond Breeze and Silk. *See, e.g.* <http://luzalmond.com/>; <http://www.insideoutng.com.au/>; <http://www.pureharvest.com.au/>.

84. As a result of the deceptive acts and practices described herein, Plaintiffs have been damaged in that they did not receive the product they were led to believe that they were paying for.

85. Furthermore, if Plaintiffs and consumers knew that Defendant's almond milk labeled products contained only 2% of almonds, they either would have purchased lower priced dairy milk or water, or would have not purchased said products at a premium price, as the false and misleading statements are artificially inflating demand and thus the price of Almond Breeze and Silk.

86. Blue Diamond and WhiteWave are generating huge profits from their falsely advertised products. For example, it was reported in a January 2014 report issued by Pennsylvania's Milk Marketing Board, that the gross margin for whole milk was just 8 cents a gallon, and 13 cents for skim and nonfat milk. Upon information and belief, Blue Diamond and WhiteWave are generating more than 10 times the profits of dairy milk manufactures as WhiteWave reported that its gross profit margins were 42.9% during 2013.

87. Plaintiffs also seek injunctive relief requiring product label changes on behalf of consumers that are continuing to be misled in that they have no idea that Blue Diamond and Silk contain only 2% of almonds, and are purchasing said products at a premium price with the belief that the products are real almond milk that is good for their health and heart healthy because of the hearth symbols contained thereon and the presumption that there are a significant amount of almonds contained therein as a result of the numerous almonds displayed on the product labeling.

### **CLASS ACTION ALLEGATIONS**

88. Plaintiffs Dimitrios Malaxianis and Tatyana Oshkina bring this action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2) and (b)(3) on behalf of the following New York class of consumers:

All persons in the State of New York who purchased Defendant's Almond Breeze almond milk labeled products described herein for consumption, during the period between January 1, 2009 and the date of the final disposition of this action, and/or such class or subclass as the Court may deem appropriate (the "New York Class").

89. Plaintiff Tracy Albert brings this action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2) and (b)(3) on behalf of the following California class of consumers:

All persons in the State of California who purchased Defendant's Almond Breeze almond milk labeled products described herein for consumption, during the period between January 1, 2009 and the date of the final disposition of this action, and/or such class or subclass as the Court may deem appropriate (the "California Class").

90. Plaintiffs reserve the right to amend the definition of the New York Class and California Class if discovery and further investigation reveals that the classes should be expanded or otherwise modified.

91. Plaintiffs reserve the right to establish further sub-classes as appropriate.

92. This action is brought and may properly be maintained as a class action under the provisions of Federal Rules of Civil Procedure 23(a)(1)-(4) and 23(b)(2) and (b)(3), and satisfies the requirements thereof.

93. There is a well-defined community of interest among members of the New York Class and California Class, and the disposition of the claims of these members of the New York Class and California Class in a single action will provide substantial benefits to all parties and to the Court.

94. The members of the New York Class and California Class are so numerous that joinder of all members is impracticable. At this time, Plaintiffs believe that the New York Class and California Class include tens of thousands of members. Therefore, the New York Class and California Class is sufficiently numerous that joinder of all members in a single action is impracticable under Federal Rule of Civil Procedure Rule 23(a)(1), and the resolution of their claims through the procedure of a class action will be of benefit to the parties and the Court.

95. Plaintiffs' claims are typical of the claims of the members of the New York Class and California Class whom they seek to represent because Plaintiffs and each member of the New York Class and California Class has been subjected to the same deceptive and improper practices by Defendant and have been damaged in the same manner.

96. Plaintiffs will fairly and adequately represent and protect the interests of the members of the New York Class and California Class as required by Federal Rule of Civil Procedure Rule 23(a)(4). Plaintiffs have no interests that are adverse to those of the members of the New York Class and California Class that they seek to represent. Plaintiffs are committed to

the vigorous prosecution of this action and, to that end, Plaintiffs have retained counsel who is competent and experienced in handling complex class action litigation on behalf of consumers.

97. A class action is superior to all other available methods of the fair and efficient adjudication of the claims asserted in this Complaint under Federal Rule of Civil Procedure 23(b)(3) because:

- a) The expense and burden of individual litigation would not be economically feasible for members of the New York Class and California Class to seek to redress their claims other than through the procedure of a class action.
- b) If separate actions were brought by individual members of the New York Class and California Class, the resulting multiplicity of lawsuits would cause members to seek to redress their claims other than through the procedure of a class action; and
- c) Absent a class action, Defendant likely would retain the benefits of its wrongdoing, and there would be a failure of justice.

98. Common questions of law and fact exist as to the members of the Class, as required by Federal Rule of Civil Procedure 23(a)(2), and predominate over any questions that affect individual members of the New York Class and California Class within the meaning of Federal Rule of Civil Procedure 23(b)(3).

99. The common questions of fact include, but are not limited to, the following:

- a) Whether a beverage can be branded or labeled as almond milk without disclosing that the beverage contains 2% of almonds;

- b) Whether the statements on Defendant's packaging would lead a reasonable consumers to believe that their products consisted more than two cups of almonds;
- c) The costs of almonds;
- d) The cost of the thickening agents which Defendant's almond milk is being made from;
- e) The cost savings by Defendant for making their almond milk primarily from thickening agents as opposed to almonds;
- f) Whether Defendant engaged in unlawful, unfair, misleading, or deceptive business acts or practices;
- g) Whether Defendant engaged in fraud, false advertising, deceptive trade practices, or other unlawful acts;
- h) Whether Defendant was unjustly enriched; and
- i) Whether Plaintiffs and members of the New York Class and California Class are entitled to an award of reasonable attorneys' fees, pre-judgment interest, and costs of this suit.

100. In the alternative, this action is certifiable under the provisions of Federal Rule of Civil Procedure 23(b)(2) because Defendant has acted or refused to act on grounds generally applicable to the New York Class and California Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the New York Class and California Class as a whole and necessitating that any such relief be extended to members of the New York Class and California Class on a mandatory, class-wide basis.

101. Plaintiffs are not aware of any difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

**COUNT I**

**Violation Of New York General Business Law § 349**

**(By Plaintiffs Dimitrios Malaxianis and Tatyana Oshkina  
on behalf of the New York Class Only)**

102. Plaintiffs Dimitrios Malaxianis and Tatyana Oshkina incorporate by reference the allegations in the preceding paragraphs and further alleges as follows:

103. This is a claim for violation of New York General Business Law § 349.

104. Defendant violated these laws by engaging in the unfair and deceptive practices as described herein which offend public policies and are immoral, unethical, unscrupulous and substantially injurious to consumers. Specifically, the practices employed by Defendant, whereby it advertised, promoted and marketed that its almond milk labeled products were heart healthy and contained a significant amount of almonds when they only contained 2% and were not healthy are unfair, deceptive, and misleading.

105. Moreover, a reasonable consumer would be misled by Defendant's conduct.

106. Plaintiffs and the New York Class are aggrieved and have suffered a loss as a result of Defendant's deceptive and unfair trade acts. Specifically, as a result of Defendant's deceptive and unfair trade acts and practices, Plaintiffs and the other New York Class members suffered monetary losses associated with the purchase of Defendant's almond milk labeled products by not receiving the product that they were led to believe that they were paying for and by paying a premium for the product. The harm suffered by Plaintiffs and the consumers in the New York Class was directly and proximately caused by the deceptive, misleading and unfair practices of Defendant.

107. Plaintiffs and the New York Class members relied on Defendant's actions described herein to their detriment.

108. Defendant's actions were also deceptive and unfair as they violated New York General Business Law § 350, in that the actions constituted false advertising, which Plaintiff specifically relied upon.

109. Plaintiffs and the New York Class members seek damages for the harm suffered.

110. Plaintiffs also seek a declaratory judgment and court order enjoining the above-described wrongful acts and practices of Defendant as well as restitution and disgorgement.

111. Plaintiffs also seek an order awarding attorneys' fees pursuant to General Business Law 349(h), and similar state statutes.

## **COUNT II**

### **Violations of Business and Professions Code § 17200, et seq.**

**(By Plaintiff Tracy Albert  
on behalf of the California Class Only)**

112. Plaintiff Tracy Albert repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

113. Such acts by Defendant, as described above, and each of them, constitute unlawful, unfair, and fraudulent business acts and practices.

114. Said false and misleading labeling violates California's Sherman Food, Drug, and Cosmetic Law (the "Sherman Law"), Health & Saf. Code § 109875 *et seq.*, which broadly prohibits the misbranding of food and provides that food is misbranded "if its labeling is false or misleading in any particular."

115. Additionally, California has adopted as its own and the Sherman Law incorporates "[a]ll food labeling regulations and any amendments to those regulations adopted



pursuant to the [Federal Food, Drug, and Cosmetic Act (“FDCA”)]” as “the food labeling regulations of this state.” Cal. Health & Saf. Code, § 110100, subd. (a). The FDCA prohibits the misbranding of food using language identical to that of the Sherman.

116. The business practices alleged above are unlawful under Cal. Bus. & Prof Code § 17200, *et seq.* by virtue of violating the Sherman law.

117. The business practices alleged above are also unlawful under Cal. Bus. & Prof Code § 17500, *et seq.*, which forbids untrue and misleading advertising.

118. Plaintiff Tracy Albert specifically relied upon said untrue and misleading advertisements.

119. Further, Plaintiff Tracy Albert and the California Class are aggrieved and have suffered a loss as a result of Defendant’s unfair and fraudulent business acts and practices. Specifically, as a result of Defendant’s unfair and fraudulent business acts and practices, Plaintiffs and the other California Class members suffered monetary losses associated with the purchase of Defendant’s almond milk labeled products by not receiving the product that they were led to believe that they were paying for and by paying a premium for the product. The harm suffered by Plaintiffs and the consumers in the California Class was directly and proximately caused by the deceptive, misleading and unfair practices of Defendant.

120. Plaintiff Tracy Albert and the California Class members relied on Defendant’s actions described herein to their detriment.

121. Plaintiff Tracy Albert and the California Class members seek damages for the harm suffered.

122. As a result of the business practices described above, Plaintiff Tracy Albert and the other members of the California Class, pursuant to Cal. Bus. & Prof Code § 17203, are

entitled to an order enjoining such future conduct on the part of Defendant and such other orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains and to restore to any person in interest any money paid for Almond Breeze as a result of the wrongful conduct of Defendant.

123. To the extent that the Court grants the relief requested herein, Plaintiff Tracy Albert is entitled to attorney's fees pursuant to Section 1021.5 of the California Code of Civil Procedure.

### **COUNT III**

#### **Unjust Enrichment**

**(By Plaintiffs on behalf of the  
New York Class and the California Class Only)**

124. Plaintiffs incorporate by reference the allegations in the preceding paragraphs and further alleges as follows:

125. By its wrongful acts and omissions, Defendant has been unjustly enriched at the expense of Plaintiffs and members of the Class, who did not receive the product that they were led to believe that they were purchasing, and thus Plaintiffs and members of the Class were unjustly deprived of money provided to Defendant.

126. It would be inequitable and unconscionable for Defendant to retain the profit, benefit, and other compensation they obtained from their deceptive, misleading, unfair and unlawful conduct alleged herein.

127. Plaintiffs and members of the Class seek restitution from Defendant, and seek an order of this Court disgorging all profits, benefits, and other compensation obtained by Defendant from its wrongful conduct.

**RELIEF REQUESTED**

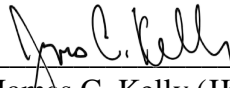
Accordingly, Plaintiffs, on behalf of themselves and the members of the Class, seek judgment as follows:

1. Certifying the Class as requested herein, certifying Plaintiffs as the representatives of the Class, and appointing Plaintiffs' counsel as counsel for the Class;
2. Ordering that Defendant is financially responsible for notifying all members of the Class of the alleged misrepresentations and omissions set forth herein;
3. Awarding Plaintiffs and the members of the Class compensatory damages in an amount according to proof at trial;
4. Awarding restitution and disgorgement of Defendant's revenues to Plaintiffs and members of the Class;
5. Awarding declaratory and injunctive relief, including: enjoining Defendant from continuing the unlawful practices as set forth herein, and directing Defendant to identify, with Court supervision, victims of its conduct and pay them restitution and disgorgement of all monies acquired by Defendant by means of any act or practice declared by this Court to be wrongful or unlawful;
6. Ordering Defendant to engage in corrective advertising;
7. Awarding interest on the monies wrongfully obtained from the date of collection through the date of entry of judgment in this action;
8. Awarding attorneys' fees, expenses, and recoverable costs reasonably incurred in connection with the commencement and prosecution of this action; and
9. Directing such other and further relief as the Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiffs and the Class demand a trial by jury as to all matters so triable.

Dated: August 24, 2015

  
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